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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROGER HARRIS CLARK,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 10, 1987

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QUESTIONS PRESENTED FOR REVIEW

1. Does a vague allegation of a scheme or device to defraud in a single mail fraud or wire fraud count of an indictment give the prosecution unrestricted license to introduce large numbers of exhibits dealing with un-indicted extraneous offenses under the guise of showing that scheme or device?

2. Does the trial judge have a constitutional obligation under the provisions of Rule 403 or Rule 404(b), Federal Rules of Evidence, to hold a preliminary hearing or enter findings of fact regarding the basis for allowing the admission of contested evidence involving extraneous offenses for which the defendant has not been convicted?

3. Are the rules of admissibility regarding contested evidence of extraneous offenses and "overt acts" to be applied in the same manner in conspiracy cases and in cases alleging use of the mail or a wire transfer in furtherance of a scheme or device to defraud where no conspiracy is charged in the indictment?

4. When contested evidence is admitted, either as an exception to the prohibitions of Rule 403 or Rule 404(b), Federal Rules of Evidence, or under the determination of the trial judge that those rules do not apply to the evidence in question, does the judge have an obligation to limit the use of that evidence or give a limiting instruction to the jury upon request by the defendant?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW . . .	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED .	2
STATUTORY PROVISIONS INVOLVED . . .	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT . . .	12
I. THE DECISION BELOW INVOLVES THE DETERMINATION OF IMPORTANT QUESTIONS CONCERNING THE SCOPE AND APPLICATION OF FEDERAL RULES OF EVIDENCE GOVERNING THE ADMISSIBILITY OF EXTRANEOUS OFFENSES OR OVERT ACTS WHICH HAVE BEEN INEQUITABLY APPLIED IN THE LOWER COURTS, AND WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. . .	12
A. Admissibility of Extraneous Offenses Under Rule 404(b) . . .	15
B. Admissibility under Rule 403	21

PAGE

II. WHEN EVIDENCE OF OVERT ACTS IS ADMITTED IN A CASE WHERE CONSPIRACY IS NOT ALLEGED, THE FAILURE TO REQUIRE LIMITING INSTRUCTIONS OR ON THE RECORD DETERMINATIONS OF ADMISSIBILITY BY THE TRIAL COURT DENIES THE CRIMINAL DEFENDANT DUE PROCESS, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL. . . 24

A. Necessity of Findings of Fact 24

B. Necessity of Limiting Instructions 27

CONCLUSION 29

CERTIFICATE OF SERVICE 30

APPENDIX:

Opinion of the Court of Appeals 1a
Judgment of the Court of Appeals 11a
Opinion of the Court of Appeals on Rehearing 12a

TABLE OF AUTHORITIES

CASES:	Page
U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978)(en banc)	16,20, 22,28
U.S. v. Kent, 608 F.2d 542 (5th Cir. 1979)	18
U.S. v. Levy, 731 F.2d 997, 1004 (2d Cir. 1984)	27
U.S. v. Preston, 608 F.2d 626, 639 (5th Cir. 1979)	24,26,27
U.S. v. Robinson, 700 F.2d 204, 213 (5th Cir. 1983)	25
U.S. v. Silva, 580 F.2d 144 (5th Cir. 1979)	16
U.S. v. Tafoya, 757 F.2d 1522 (5th Cir. 1985)	28
U.S. v. Young, ___ U.S. ___, 105 S.Ct. 1038, L.Ed.2d ___ (1985)	28
STATUTES AND RULES:	
United States Constitution, Amendment Five	2,20,23,27
United States Constitution, Amendment Six	2,20

	Page
28 U.S.C. §1254(1)	2
Federal Rules of Evidence 104(a)	3
Federal Rules of Evidence 104(b)	3,16
Federal Rules of Evidence 105	3,27,28
Federal Rules of Evidence 403	4,13,15,21, 22,25,27
Federal Rules of Evidence 404(b)	4,13,15, 17,21
Federal Rules of Evidence 609(a)	4,24
MISCELLANEOUS:	
Wright & Graham, Federal Practice and Procedure: Evidence §5223 (1978 with 1986 Supplement)	22

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The petitioner, Roger Harris Clark, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (unpublished) appears in the Appendix hereto at page 1a. The unpublished opinion of the Court of Appeals on rehearing appears in the Appendix at page 12a. No opinion was rendered by the District Court for the Western District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 20, 1986. A timely petition for rehearing was denied on February 12, 1987, and this petition for writ of certiorari was filed within 60 days of that date. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; * * *

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). * * *

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence not Admissible To Prove Conduct; Exceptions; Other Crimes

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

STATEMENT OF THE CASE

This matter involves the definition of "extraneous offenses" and related matters of evidence in the context of various inter-related Federal Rules of Evidence governing admissibility of material outside the indicted offenses in a federal criminal case.

Petitioner Roger Clark grew up in the oil industry of West Texas. After graduating from college, he purchased two family businesses in 1977. Both companies specialized in "rigging up" and repairing huge oil field trucks by adding wenches, tanks and other specialized equipment. The businesses were named Clark Engineering of Odessa and Clark Engineering of Brownwood. To purchase the businesses of his father and his uncle, Roger Clark borrowed $2.7 million from the First National Bank of Midland, Texas.

In 1978 Roger Clark purchased a third business in Tulsa, Oklahoma, which then became Clark Manufacturing of Tulsa, Inc.

The Tulsa plant was basically a fabricating shop when purchased, but was converted to the same type of business as was operating in Odessa. In addition to rigging trucks, the Tulsa plant also manufactured specialized heavy duty trailers for the oil industry. Most of the equipment constructed and installed by the various Clark companies, including the trailers, was so specialized that it could only be used in the oil well drilling and servicing industries. Many of the trucks and trailers were for hauling oil drilling rigs and equipment so big that special permits were required for travel on the highway. The "rigged" trucks sold for anywhere between $80,000 and $225,000 each, and the rigging alone often ran over $50,000.

The Odessa and Brownwood operations were financed by a portion of the capitalization loan from First National Bank of Midland and by subsequent loans from Permian Bank and Trust, Odessa, Texas, and Bank of the West,

Odessa, Texas. Clark Manufacturing of Tulsa, Inc. was financed by Texas Western Financial Corporation of Dallas, Texas, with a $300,000 line of credit secured by accounts receivable. Texas Western also made separate loans totalling $250,000 to the Tulsa company for the purchase of equipment for the factory and for inventory. These loans were unrelated to the line of credit. The line of credit was established in such a way that when the credit extended to Clark Manufacturing reached the $300,000 limit, all further lending was stopped until payments were made by Clark to reduce the debt below the maximum limit.

During 1979, 1980, and most of 1981, all three of the companies sold everything they could produce, and there was a waiting list of several weeks to get a truck rigged. Clark companies had the reputation of doing the best work in the industry.

At the end of 1981 the oil business began to slump, but everyone assumed the slump was temporary. The industry had always been subject to up and down swings, but this time the "down" never came back up. A major portion of the oil well drilling and servicing industry was destroyed. Trucks rigged by Clark suddenly stopped selling.

The three Clark companies had tremendous overheads and were financed almost entirely on borrowed capital. Roger Clark began seeking ways of obtaining new business unrelated to the oil field and continued cash flow to keep his businessed alive and his workers employed. In early 1982 Roger Clark sold Clark Engineering of Brownwood and applied the proceeds against his debt at First National Bank of Midland. A portion of the proceeds were returned by the bank to Clark for use as working capital. Roger Clark eventually invested all of his personal estate in the businesses, but to no avail.

Under his agreement with Texas Western, Clark would submit accounts receivable to Texas Western and would in turn be loaned 80% of the amount receivable. When the money was received on account from the purchaser, Clark would forward the money to Texas Western and receive the 20% balance less interest and agreed expenses.

Counts 1 and 2 of the indictment in this case charge the use of the mail and a wire transfer of money in conjunction with an alleged scheme or device by the defendant Roger Clark to fraudulently obtain financing from Texas Western Financial Corporation. Texas Western insisted that only actual final sales were to be submitted as accounts receivable for purposes of obtaining loans against the established line of credit, and its representatives denied at the trial that they had ever authorized the financing of consignment sales.

Roger Clark testified that he considered the sales final and that the truck dealers involved were to pay Clark as soon as the trucks were sold. The trucks were initially provided by the truck dealers, and considerable alteration of the truck chassis was often necessary. Subsequent removal of the equipment installed by Clark would have been expensive and in many cases not possible. In fact the uncontradicted evidence shows that Clark was required to return removed equipment in two bankruptcy cases when the bankruptcy judge determined that Clark was only an unsecured creditor once the equipment installation was completed.

So long as the market was good, no problems occurred. The conflict of opinion became apparent when the oil industry fell apart and the trucks could not be sold to anyone. At the trial several of the truck dealers contradicted Roger Clark's claim that the transactions were final sales and in turn

claimed that the transactions involved were strictly consignments. The allegations of fraud arose because the invoices on the disputed sales were submitted to Texas Western as accounts receivable and loans were made to Clark Manufacturing based upon those invoices.

Roger Clark was ultimately unsuccessful in his attempts to keep his businesses afloat. Following a long federal grand jury investigation, Roger Clark was indicted and charged in five counts relating to various phases of his financial dealings with banks and lending institutions. Counts 1 and 2 allege the use of the mail and a wire transfer to further a scheme to defraud Texas Western Financial Corporation. The remaining three counts allege the making of false statements and reports to Permian Bank and Trust and Bank of the West to obtain loans.

Following his conviction on all five counts by a jury and the assessment of two consecutive 5 year prison sentences by the

court, Roger Clark appealed alleging the improper admission of extraneous offense evidence which should have been excluded under the various applicable Rules of Federal Evidence. The Fifth Circuit Court of Appeals affirmed the conviction holding in essence that the exclusionary provisions of the Rules of Evidence did not apply because no "extraneous offenses" were involved. This petition raises fundamental questions regarding the interpretation and application of the Federal Rules of Evidence in criminal cases and the relationship of their exclusionary provisions to the Fifth and Sixth Amendments of the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW INVOLVES THE DETERMINATION OF IMPORTANT QUESTIONS CONCERNING THE SCOPE AND APPLICATION OF FEDERAL RULES OF EVIDENCE GOVERNING THE ADMISSIBILITY OF EXTRANEOUS OFFENSES OR OVERT ACTS WHICH HAVE BEEN INEQUITABLY APPLIED IN THE LOWER COURTS, AND WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The opinion of the Fifth Circuit Court of Appeals in this case highlights significant and recurring problems concerning a trial court's duties and obligations under the law and the constitution when making discretionary decisions about the admissibility of extraneous offense or "character" evidence under Rules 403 and 404(b), Federal Rules of Evidence.

Roger Clark was charged with one count of mail fraud, one count of wire fraud, and three counts of making false statements to various financial institutions, all in conjunction with an alleged scheme or device to defraud those financial institutions of money. At trial, the government offered evidence of eighteen extraneous offenses allegedly committed by Clark, but not included in the indictment. At a pretrial hearing on the defendant's Motion in Limine, the court indicated that he would probably not allow more than five or six of the

extraneous matters to be admitted. That number would be sufficient to show scheme or device without being prejudicial. He specifically stated that eighteen would be too many. Early in the trial, however, the court reversed the prior decision and allowed all of the extraneous offenses before the jury without qualification or restriction. The government was not required to establish the admissibility of the evidence or even to state for the record the prosecution's theory of admissibility.

Contrary to statements in the opinion below by the court of appeals (Appendix p. 9a, Infra.), the defendant made timely objection to the admission of the evidence and specifically stated that limiting the admissions to the five or six pieces of evidence originally considered appropriate by the court would be the only fair way to balance the danger of prejudice to the defendant against the need of the prosecution to show a scheme.

The defendant was given a running objection to all of the evidence in question, but the objection itself was overruled. The trial court made no findings for the record regarding the basis for admission of the evidence or for his apparent determination that the prejudicial nature of the evidence did not outweigh the probative value of the evidence to the government.

A. Admissibility of Extraneous Offenses Under Rule 404(b)

The question of admissibility is governed by Rules 403 and 404(b) of the Federal Rules of Evidence. The opinion below readily acknowledges that the "propensity" evidence excluded by Rule 404(b) is highly prejudicial and could actually serve to lessen the burden of proof which the law places on the prosecution. While acknowledging that there are several exceptions to the rule against admissibility, the Fifth Circuit has established several prerequisites which must be met before the evidence can lawfully be

admitted.

These requirements were originally set out in U.S. v. Silva, 580 F.2d 144 (5th Cir. 1979), and modified by the Fifth Circuit en banc in U.S. v. Beechum, 582 F.2d 898 (1978) as follows:

(1) the offense is not too remote in time,

(2) the element of the prior crime for which there is a recognized exception must be a material issue in the case,

(3) there is a substantial need for the probative value of the evidence, and

(4) there must be sufficient evidence that the extrinsic offense requires the same intent as the charged offense and that the jury could find that the defendant committed the extraneous offense.

The standard for determining the sufficiency of the evidence for part (4) above is that set out by Rule 104(b), Federal Rules of Evidence. U.S. v. Beechum, 582 F.2d at 913. The original holding in Silva makes it clear that because of the "danger of the prejudicial effect of similar offenses" all of the

stated prerequisites must be met by the proof before the evidence can be admitted. 580 F.2d, supra at 148.

In its original decision in this case, the court of appeals avoids the necessity of considering Clark's claims under Rule 404(b) by holding that the acts offered in proof were not "other offenses" and, therefore, not covered by Rule 404(b). In the process the court simplifies its task by classifying all of the opposed evidence as "other invoices" similar to the one specifically alleged in the indictment. In doing so, however, the court misconstrues the evidence to the serious detriment of the defendant. The attempted corrections made in the opinion on rehearing did not solve the error and were not the corrections requested by the petitioner.

One of the major issues in this case from the beginning has been the question of whether Roger Clark intentionally took actions which he knew to be illegal. The government attempted through the evidence

presented at trial to leave the impression that all of Roger Clark's dealings with financial institutions during the six month period in question were part of a well thought out, carefully organized scheme to defraud. An essential element of mail or wire fraud is the specific intent to commit fraud. U.S. v. Kent, 608 F.2d 542 (5th Cir. 1979). Fraudulent intent was vigorously denied by Clark and his witnesses.

All of the extraneous matters discussed by the witnesses and documents introduced in connection with their testimony were not "invoices" as claimed by the court of appeals. Other documents of a very different nature were also introduced without any connection to Roger Clark and without proof that he even had knowledge of the transactions or the documents involved. Among these was a check from a customer which was apparently altered after its receipt by one of the Clark companies. Even though there was absolutely no tie between the check and Roger Clark made by

the government (Clark specifically denied knowledge of the check during his testimony), the evidence was admitted before the jury without exception or restriction.

Most of the cases cited by the court of appeals are drug conspiracy cases. It is clear from a review of the cases that the government may soon be able to obtain a conviction by merely alleging a conspiracy. The rules of evidence do not seem to exclude anything from such a case.

The issues which petitioner asks this Court to consider challenge the seemingly unlimited discretion being allowed to the trial judge in the Fifth Circuit with regard to evidentiary decisions under the Rules of Evidence. Are trials involving vague allegations of scheme and device to be governed by the same unrestricted admissions standard as is presently being applied in conspiracy cases? If so, are the rights of a defendant to a fair trial and the effective assistance

of counsel under the Fifth and Sixth Amendments to our Constitution to receive any protection through procedural due process requirements? Under the present non-system of protection, the courts can reach the results without accountability or realistic chance for meaningful review.

The decision to admit the contested evidence against Roger Clark was made by the trial judge before any significant testimony was started and without any basis in the record for making the determinations required by Beechum. In its opinion on rehearing (Appendix p. 12a, Infra.) the court of appeals again dodges the issue posed by Clark by claiming that he is raising a "sufficiency of the evidence" question for the first time on rehearing. Therefore, they are not required to respond.

Objection to the evidence in question on the basis of failing to connect Roger Clark to the altered check or the incorrect

billings was made at every stage of the proceedings, and the court is incorrect in claiming that the issue was first raised on rehearing. The unwillingness of the appellate court to give the defendant a realistic review of the trial court's actions, when coupled with the total lack of due process guidelines for the trial court create an untenable situation. The Supreme Court should establish minimal constitutional requirements for the admission of evidence in criminal cases and the necessary protections for assuring the defendant a fair and appropriate review of the trial court's discretion on appeal.

B. Admissibility Under Rule 403

Even if we assume for purposes of argument that the extraneous acts fit into one of the exceptions under Rule 404(b) or, as the court of appeals held, that the acts and documents should not even be classified

as extraneous offenses, the evidence should still be excluded under Rule 403.

The central concern of Rule 403 is whether the probative value of the evidence sought to be introduced is "Substantially outweighed by the danger of unfair prejudice." "One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense. (citation omitted) This danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." U.S. v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978)

There is much dissatisfaction with the broad discretion given the trial courts by the reviewing courts of appeals in the application of Rule 403. See, e.g., Wright & Graham, Federal Practice and Procedure:

Evidence §5223 (1978, with 1986 supplement). The admission or exclusion of evidence has an obvious effect on the outcome of a trial. The problem is that the appellate courts have almost completely abdicated their responsibility to review discretionary decisions of the trial courts permitting arbitrary, unsubstantiated decisions.

Because the Fifth Circuit and other courts of appeals have failed to establish guidelines which provide realistic protection to defendants under the Constitutional due process requirements of the Fifth Amendment, this Court should establish those guidelines. This is an appropriate case to utilize for the establishment of those guidlines because the injury to the petitioner Clark is readily apparent.

II.

WHEN EVIDENCE OF OVERT ACTS OR EXTRANEOUS OFFENSES IS ADMITTED IN A CASE WHERE CONSPIRACY IS NOT ALLEGED, THE FAILURE TO REQUIRE LIMITING INSTRUCTIONS OR ON THE RECORD DETERMINATIONS OF ADMISSIBILITY BY THE TRIAL COURT DENIES THE CRIMINAL DEFENDANT DUE PROCESS, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL.

A. Necessity of Findings of Fact

Even though not mandated by the terms of Rule 609(a) of the Federal Rules of Evidence, the Fifth Circuit ruled in 1979 that a hearing on the record was required to determine the admissibility of evidence of a prior conviction to protect the defendant's right to a fair trial. U.S. v. Preston, 608 F.2d 626, 639 (5th Cir. 1979). A part of the judicially imposed mandate was a requirement that the trial court make findings of fact. The object of the hearing is twofold: (1) to ensure that the trial court used the correct standards in making the determination of admissibility and (2) to set out for the

appellate court the basis for the decision for purposes of review.

The same type of issue was subsequently considered in U.S. v. Robinson, 700 F.2d 204, 213 (5th Cir. 1983) in conjunction with the admissibility requirements of Rule 403, Federal Rules of Evidence. The evidence in Robinson dealt with extraneous offenses which had not resulted in prior convictions. The major distinction between the two cases is that the court ruled in Robinson that the hearing on the record and findings of fact were not mandatory unless requested by the defendant.

While there was a discussion on the record in this case which made references to the contested evidence in general terms, the government was not required to offer any support for its offer of the extraneous matters, no findings of fact were requested, and none were made by the court. Petitioner respectfully submits that Robinson was

incorrectly decided and that its application to the case of Roger Clark denied him a fair trial. The opinion of the court of appeals fails even to respond to this issue as raised by Clark on appeal.

While an actual conviction may on first blush appear to have more potential for prejudice, in reality, previously unproven allegations not charged in the indictment which have not resulted in prior conviction carry a much stronger possibility of prejudice to a fair trial. The same constitutional concerns which gave rise to the holding in U.S. v. Preston, 608 F.2d 626 (5th Cir. 1979) are at least as serious in situations involving extraneous offenses for which no conviction has been obtained. In view of the fact that the extraneous acts can be so easily misused by the prosecution or the jury, the need for a careful preliminary examination by the trial court can be readily

seen. The Fifth Amendment's due process requirements definitely apply to this situation, and the Preston standards should be mandated for Rule 403 determinations in all cases without the necessity of a request from the defendant.

B. Necessity of Limiting Instructions

Even where extrinsic evidence of extraneous acts or offenses is properly admitted by the trial court, the defendant is entitled to a cautionary jury instruction that the evidence could only be considered for the purpose offered and not as an indication of the defendant's propensity. U.S. v. Levy, 731 F.2d 997, 1004 (2d Cir. 1984). Rule 105, Federal Rules of Evidence, requires such a restrictive instruction to the jury. Counsel for Roger Clark made a request for limiting instructions on several occasions and specifically objected to the court's charge because it contained no limiting instruction.

The Fifth Circuit has long recognized the significance of the limiting instruction. U.S. v. Beechum, 582 F.2d 898, 917 (5th Cir.)(en banc). The importance of such an instruction was recently confirmed by the Fifth Circuit in U.S. v. Tafoya, 757 F.2d 1522 (5th Cir. 1985). In discussing the requirements of a fair trial as mandated by this Court in U.S. v. Young, _____U.S._____, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the court of appeals in Tafoya praised the care of the trial court in giving "clear curative, limiting, and final instructions to the jury."

The refusal of the court of appeals to require limiting instructions in this case or even to discuss the issue goes against the requirements of Rule 105, Federal Rules of Evidence, the previous decisions of the Fifth Circuit, and the requirements of a fair trial established by this Court in U.S. v. Young, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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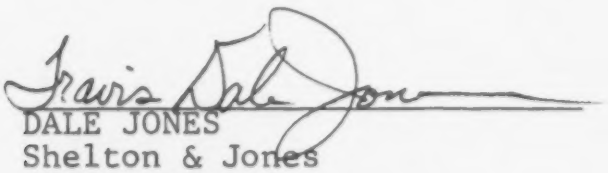
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 1987, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1345
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ROGER HARRIS CLARK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(Docket No. Mo-85-CR-29-1)

(November 20, 1986)

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:*

Roger Harris Clark appeals from his conviction on five counts of mail fraud, wire fraud, and making false statements to influence a federally insured bank. 18 U.S.C. §§ 1341, 1343, and 1014. He agrues that the district

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

SJ 11-10-86; TMR 11-13-83; WED 11/18

court erred in admitting evidence of eighteen invoices not mentioned in the indictment. Because we find that the sending of the invoices did not constitute "other crimes, wrongs, or acts" under Fed. R. Evid. 404(b), we affirm.

I. BACKGROUND

Roger Clark owned and managed Clark Manufacturing of Tulsa, Inc., which specialized in rigging trucks and heavy equipment for the oil industry. He had a line of credit for approximately $250,000 with Texas Western Financial Corportion ("Texas Western"), secured by his equipment and inventory. As part of this credit agreement, Clark Manufacturing could submit to Texas Western invoices representing accounts receivable; Texas Western would immediately wire Clark eighty percent of the amount represented by the invoice, paying the remaining twenty percent after collection.

In 1981, the oil industry began to slump. Orders for Clark Manufacturing dropped sharply. Clark sold off one of his businesses and began violating his loan agreement by submitting to Texas Western invoices that represented only consignments of equipment to dealers, not final sales. Clark also altered invoices in order to submit the same invoice twice. Finally, he applied for loans from two other banks, offering as security a partially complete Lo-Boy trailer already pledged to Texas Western, and overstating its value.

A grand jury charged Clark with mail fraud (Count One), wire fraud (Count Two), and making false statements concerning the Lo-Boy trailer to banks insured by the Federal Deposit Insurance Corporation (Counts Three to Five). On Count One, the trial court admitted evidence of eighteen fraudulent invoices, not specifically mentioned in the indictment, that Clark allegedly mailed to Texas Western. The jury found Clark guilty

on all five counts, and the court sentenced him to ten years in prison, four years' suspended imprisonment, and five years's probation.

II. DISCUSSION

Federal Rule of Evidence 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rules exclude this "propensity" evidence because it is highly prejudcial; a jury that hears such evidence is less likely to look carefully at the proof linking a defendant to the particular crime charged and more likely to convict him for general bad "character." United States v. Beechum, 582 F.2d 898, 910-11 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979); see generally, 2 J. Weinstein & M. Berger, Evidence ¶ 404[04] (1986).

Before Rule 404(b) can apply, however, the court must determine whether the acts offered in proof are "other" than those charged. For example, in conspiracy cases, the charge itself may cover a broad range of activities. See, e.g., United States v. Merida, 765 F.2d 1205, 1221-22 (5th Cir. 1985); United States v. Simpson, 709 F.2d 903, 907 (5th Cir.), cert. denied, 464 U.S. 942, 104 S.Ct. 360 (1983); United States v. Aleman, 592 F.2d 881, 885-86 (5th Cir. 1979). Even when an act is not included in the indictment, this Court has refused to call it an "other act" for Rule 404(b) purposes if it forms part of the criminal transaction or series charged or if it is necessary to prevent the jury from getting an incomplete picture of the crime. United States v. Sepulveda, 710 F.2d 188, 189 (5th Cir. 1983)(evidence of a heroin transaction "inextricably intertwined" with cocaine transaction charged); United

States v. Torres, 685 F.2d 921, 925 (5th Cir. 1982)(sale of narcotics samples was first step toward larger sale charged); United States v. Kloock, 652 F.2d 492, 494 (5th Cir. 1981)(defendant's possession of a false driver's license furthered the cocaine conspiracy charged); see generally, 2 J. Weinstein & M. Berger ¶404[10] at 404-77 to 81.

This Court has reversed the conviction of a border guard for forging border crossing applications when the trial court admitted evidence of thirty-two additional forgeries. United States v. Krezdorn, 639 F.2d 1327, 1331-32 (5th Cir. 1981), cert. denied, 465 U.S. 1066, 104 S.Ct. 1416 (1984). In that case, the indictment did not mention the thirty-two other forgeries or charge a conspiracy; nor did the prosecution meet any exception of Rule 404(b). The additional forgeries represented entirely distinct and cumulative crimes whose prejudicial value outweighed their probative effect. Id.; Fed. R. Evid. 403.

Count One of the indictment in the instant case charges that Clark

> [b]eginning in or about February 1982 and continuing until in or about November 1982, . . . devised, intended to devise and participated in a scheme or artifice to defraud and attempting to do so, the Defendant, on or about April 13, 1982, in the Western District of Texas, did cause to be delivered by mail . . . a letter and specification sheet . . . in violation of Title 18, United States Code, Section 1341. (emphasis added).

The indictment tracks the wording of the statute, which requires that specific instances of mail fraud further a "scheme or artifice to defraud." 18 U.S.C. §1341. Thus, the existence of a "scheme" is an element of the crime itself, and was properly alleged in the indictment.[1] In other words, under the definition of mail fraud given in 18 U.S.C. §1341, the prosecution is obliged to charge, and then prove not only specific mailings, but the existence of a general scheme to defraud. United States v. Gordon,

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1. Clark has not argued, either at trial or on appeal, that the indictment should have been more specific concerning the scheme.

780 F.2d 1165, 1170-72 (5th Cir. 1986). The "scheme" requirement distinguishes this case from Krezdorn, where no conspiracy or plan was charged. 639 F.2d at 1331. Instead, the instant case resembles the conspiracy cases in which the crime itself involved a series of acts. Since the eighteen other invoices were admitted to prove the crime itself, Rule 404(b) does not apply.[2]

Evidence admissible under other rules may still be excluded by the trial judge if he determines that its probative value is outweighed by its unfair prejudice to the defendant. Fed. R. Evid. 403. A trial judge's balancing of probative value and prejudice is to be overturned only for abuse

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2. If 404(b) did apply, the prosecution might have been able to gain admission of the eighteen invoices under that Rule's "plan," "knowledge," or "intent" exceptions. Because we find that the Rule is inapplicable, we need not decide whether the trial court's instructions to the jury adequately limited the purposes for which the additional invoices could be used, as required by Fed. R. Evid. 105.

of discretion. Sepulveda, 710 F.2d at 189. The probative value of evidence is greatest when that evidence concerns an act that resembles the act to be proved. United States v. Fowler, 735 F.2d 823, 830 (5th Cir. 1984)(evidence of a previous fraudulent bid to the same government agency is highly probative in a prosecution for mail fraud in submitting a fraudulent bid). In the instant case, the eighteen fraudulent invoices are very similar to the letter specifically mentioned in the indictment. The Government needed to admit some of these invoices in order to establish a scheme, and Clark has not argued that fewer than eighteen would have sufficed. Nor is the white-collar crime of falsifying invoices likely to inflame the jury against the defendant. In short, this Court cannot find that the trial court abused its discretion in refusing to exclude the additional evidence on Rule 403 grounds.

In conclusion, the additional eighteen invoices did not tend to prove "other . . . acts" under Fed. R. Evid. 404(b), nor did they cause "unfair prejudice" to Clark under Rule 403. The conviction is, therefore,

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1345
Summary Calendar

D.C. Docket No. MO-85-CR-29-01

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROGER HARRIS CLARK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before REAVLY, JOHNSON, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that the defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

November 20, 1986

ISSUED AS MANDATE:

OP-JDT-9C
Rev. 4/85

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1345

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROGER HARRIS CLARK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

February 12, 1987

Before REAVLEY, JOHNSON, and DAVIS,
Circuit Judges.

PER CURIAM:

Counsel for the defendant, Roger Harris Clark, has pointed to an inaccuracy in the unpublished opinion, in that the Court's references to "eighteen invoices" should refer to "eighteen invoices and other documents relating to accounts receivable." The opinion is hereby corrected. However, the inaccuracy is not material to the disposition

of the case. To the extent that Clark argues that the United States failed to link him adequately to each of those eighteen documents, we read his argument as a challenge to the sufficiency of the evidence. Because this challenge is made for the first time on appeal in a petition for rehearing, it is precluded.

IT IS ORDERED THAT THE petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.